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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-2044

SHIRLEY KARP, Individually, as Executrix of the Estate of Haskell Karp, and as next friend of Joel Karp and Martin Karp, Minors, and Harry Michael Karp,
Petitioners

v.

DENTON A. COOLEY AND DOMINGO S. LIOTTA,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF DENTON A. COOLEY

Respondent, DENTON A. COOLEY, in opposition to the Petition of SHIRLEY KARP, ET AL, for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit herein would show:

OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of Texas is reported at 349 F. Supp. 827.

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 493 F.2d 408.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. **Whether there was a misapplication of a state statute making the records and proceedings of a medical organization committee confidential and not available for court subpoena.**

II. **Whether the qualification of a witness out of the presence of the jury and exclusion of his testimony denied due process of law.**

III. **Whether a directed verdict denied rights to trial by jury.**

STATEMENT OF THE CASE

This Texas diversity action for medical malpractice arose out of the first clinical use of a mechanical heart. The case involves unique facts, not law. The legal issues were decided based upon long-standing Texas precedents except for the holding that in a therapeutic context, an action for experimentation is governed by traditional malpractice standards and requires expert medical testimony. While this question had not been previously addressed by Texas decisions, petitioners do not here complain of this holding which is the only legal question fairly characterized as novel. As is readily apparent from the opinions below, the case turns significantly upon its facts, particu-

larly with regard to the requisite issues of proximate cause necessary to each advanced theory of liability. At the conclusion of all of the evidence, the trial court directed a verdict for the defendants which was affirmed by the Fifth Circuit Court of Appeals.

ARGUMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

I. There was no misapplication of a state statute.

Petitioners have suggested no special and important reasons for review of this case by certiorari and there are none. No important state question has been decided in conflict with Texas law. No question of federal law was urged below or decided. Petitioner's Reasons for Granting a Writ are essentially a verbatim restatement of their Petition for Rehearing to the Fifth Circuit renewing arguments on the relevancy and sufficiency of evidence that have been rejected twice. No constitutional question is necessary for decision or involved.

Petitioner's argument that Article 4447d(3), Texas Revised Civil Statutes Annotated (Supp. 1974), is unconstitutional was not made to the trial court or to the court of appeals in brief, oral argument, or Petition for Rehearing En Banc. See Assignments of Error, 493 F.2d at 411. Absent any attempt whatsoever by petitioners to demonstrate exceptional circumstances referrable either to Mrs. Karp or the public at large, there is no compelling reason for consideration of this argument not pressed or passed on below. *E.g., Duignan v. United States,* 274 U.S. 195 (1927). Previously, it had merely been asserted that the Texas statute had no application to the records[1]

1. The records involved were of a committee appointed by the Board of Trustees of the Baylor College of Medicine to investigate

involved and that portions of the records were admissible for impeachment purposes.

Petitioners urge that the court of appeals misapplied the Texas statute because it was only intended to protect the identity of persons treated with venereal or other communicable diseases. This argument is unmeritorious and presents, at most, only a question of the construction of a local statute rejected by both lower courts, not justifying certiorari review. *E.g., Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944); *MacGregor v. State Mutual Co.,* 315 U.S. 280 (1941). Texas article 4447d(3) is a portion of the statute designed to reduce morbidity and mortality and to sanction and promote candor in peer review of health care administered by physicians and hospitals. It is fairly representative of similar state statutes. *E.g.,* Minnesota Statutes Annotated, §§ 145.61, 145.64 (Supp. 1974). It is apparent that the statute has a broader and more significant purpose than the narrow objective suggested by petitioners since the identity of persons afflicted with venereal disease is given confidential status by other Texas statutes specifically dealing with the venereal disease problem. Texas Revised Civil Statutes Annotated art. 4445, § 8 (Supp. 1974); Texas Revised Civil Statutes Annotated art. 4445c, § 4 (Supp. 1974). The immunity conferred by the statute in question upon

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compliance by the college with guidelines of the National Heart Institute. (Tr. 1081). The records were voluntarily produced by counsel for Baylor College of Medicine pursuant to the Court's request, not pursuant to a subpoena. No subpoena was quashed. Counsel for petitioner suggested that the records be sealed and made available to the Trial Court for the court's inspection. (Tr. 70). This in camera examination made evident that no report had been made by the committee and that what had been produced was a "draft" of the committee's counsel and an unsigned rejected summary of a statement by respondent Cooley. (Tr. 1061, 1063).

those furnishing information to medical committees is further illustrative of the broader purpose of the statute than protecting the identity of communicable disease patients. For these reasons, the lower courts reasonably concluded that the statute protected the documents in question.

Petitioners, without citation of authority, now, for the first time, obliquely suggest that the statute is unconstitutional, presumably as violative of the 14th Amendment. The single supporting reason is that the statute denies "the right to factual testimony", a function of each and every common law or statutory privilege which exists. No constitutional question need be reached, however, because petitioner's argument continues to ignore the rulings of both lower courts, based upon in camera reviews, that the records were inadmissible and of doubtful probative value. There is no constitutional right to introduce inadmissible evidence. It is elementary that petitioners could not have impeached respondent Cooley with a statement made by respondent Liotta. The lower court rulings on the admissibility of the evidence, standing alone, are dispositive of the issue raised by the Baylor Committee Records and accordingly no reason for review is demonstrated. *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959).

Respondent has discovered no decision suggesting that such a statute denies due process of law. So strong is the public policy supporting the confidential nature of such investigations intending to improve public health care, courts have sustained the privileged nature of communications in these proceedings even in the absence of such a statute. In delineating the valid and reasonable purpose

of the privilege, the United States District Court for the District of Columbia stated in *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (1970):

> "Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit. The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be open to the discovery process. The public interest may be a reason for not permitting inquiry into particular matters by discovery . . . There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded."

The purpose of article 4447d(3) is eminently reasonable, it was correctly applied by the local court, and the evidentiary ruling on the privileged records was not manifestly erroneous.

II. There was not a denial of due process in the qualification of Dr. DeBakey and the exclusion of his testimony.

Respondent is uncertain how the action of a federal trial judge in the qualification of a witness and the eventual exclusion of his evidence relates to the deprivation of 14th Amendment rights. First, this reason for certiorari merely calls upon this Court to review evidence and analyze specific facts which two courts below held did not raise a Texas malpractice submission to the jury. There is not even a suggestion that the ill-founded allegations of error relate in any fashion to the public or to other potential litigants so as to justify the exercise of certiorari jurisdiction. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954).

Secondly, there are independent grounds sustaining, indeed necessitating the directed verdict below. Even if Dr. DeBakey's testimony had been admitted, the record simply contained no evidence that the ventriculoplasty, the orthotopic cardiac prosthesis, or the biological transplantation was a proximate cause of injury to or the death of Mr. Karp. 493 F.2d at 423-25. To the contrary, all of the physicians who testified were of the universal opinion that the respondent's treatment was not a proximate cause of the death of Mr. Karp. 493 F.2d at 422. The more likely causes of pneumonia and renal shutdown resulting in the patient's death were unrelated to the mechanical heart. This evidence compelled a directed verdict under Texas law notwithstanding the testimony of Dr. DeBakey. *Bowles v. Bourdon*, 219 S.W.2d 779, 782 (Tex. 1949).

Thirdly, there was no error in the qualification of the witness or in the exclusion of Dr. DeBakey's testimony.

The trial court's discretion to consider the relevancy and admissibility of evidence outside the presence of the jury is clear. 5 J. Moore, Federal Practice, § 43.11, at 1383 (2d ed. 1974). Conducting the proceedings in chambers dispelled the possibility that jurors would receive inadmissible evidence from lay media reporting. Reviewing the proceedings, the Fifth Circuit rejected the assertion that there was a "judicial coercion"[2] of the witness. 493 F.2d at 424. Nor was the trial court's exclusion of evidence clearly or manifestly erroneous. *Salem v. United States Lines Co.*, 370 U.S. 31 (1962). Dr. DeBakey had no opinions referrable or relevant to Mr. Karp's treatment. After reading Mr. Karp's medical records at the court's suggestion, he answered no hypothetical questions and declined to give opinions on the pump used in Mr. Karp's operation. The authority cited by petitioners in support of the proposition that Dr. DeBakey could be compelled to testify has application only to the situation where an expert witness appears voluntarily at trial and offers expert testimony and then refuses to answer additional questions without compensation. Petitioner's argument, moreover, ignores the fact that this witness did not have an expert opinion[3] which could be compelled by the

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2. Prior to any questions of the witness when judicial coercion was suggested, the court stated:

> "If the record reflects that I have intimated to Dr. DeBakey anything or have indicated one way or the other as to what I will permit him to testify to in front of the jury, then somebody reading the record will have to find it . . . It's a void in the record insofar as I am concerned . . . I have made no determination as to whether or not Dr. DeBakey will be permitted to testify before the jury . . ." (Tr. 1365).

3. (Tr. 1394) "Q. Dr. DeBakey, at this time, sir, if I agree to pay your fee to testify as an expert in this case, would you agree to examine these records and testify as an expert? A. No. I thought I made my position clear about this Judge, and I would like to make it clear again. I made it at the deposition I want to make it here

court. Under this record, there was neither error in exclusion of evidence nor denial of petitioner's rights.

III. There was not a denial of the right to trial by jury.

Petitioner's third reason for granting the writ is a renewed complaint that the evidence was factually sufficient to raise an issue for jury submission on informed consent or fraud.[4] The assigned error relates only to this cause, is unrelated to the public generally, and as before ignores the fact that the lack of legal causation is an independent ground supporting the trial court's decision. The Texas requirements of a medical standard for disclosure established by expert evidence was not met and a breach of duty not shown. *Wilson v. Scott*, 412 S.W.2d 299 (Tex. 1967). Secondly, the medical evidence did not establish that an unrevealed risk materialized to the patient's harm. *See Canterbury v. Spence*, 464 F.2d 772, 790 (D.C. Cir. 1972). It must be remembered at this point that the undisputed medical evidence established that Mr. Karp faced imminent death prior to any surgery and that his heart would not support life after the conventional repair was performed. Whether measured objectively or sub-

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once and for all. I am not in a position to give expert testimony about Mr. Karp. I do not know Mr. Karp. I never saw him before. I had no observations, clinically, about him. I cannot therefore give expert testimony about a patient I never saw. I know from past experience that reading the records does not provide me with that kind of knowledge. I have read the records of this man and feel the same way I felt before I read the records, that I am not in a position to give expert testimony about what should have been done or not done in that particular patient. The Court: Or whether it was done skillfully or unskillfully? A. I am unable to say."

4. This section of the Petition for Certiorari is a verbatim recitation of the Petition for Rehearing in the Court of Appeals, then submitted under the caption "Informed Consent".

jectively, no evidence was presented to indicate that the patient would not have consented to the operation. Petitioners simply failed to introduce evidence of the requisite elements of a common-law cause of action for informed consent and the trial court's action was accordingly correct and denied no 7th Amendment rights. *Galloway v. United States,* 319 U.S. 372 (1943).

If the cause of action is classified as fraud, there was no showing of any relationship of causation between the absence of a donor heart or any other alleged misrepresentation and any harm to the patient. Absent causation or detriment a substantive cause of action for fraud was not established by Texas standards. *Thomas v. Beckering,* 391 S.W.2d 771 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.); *Allison v. Blewett,* 348 S.W.2d 182 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.).

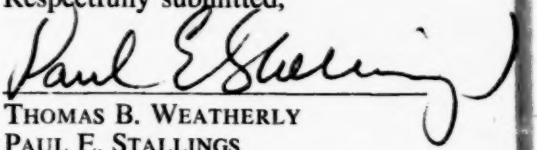
Ultimately, petitioner's reasons for granting a writ may be reduced to questions of relevancy and sufficiency of evidence. Phrasing these issues in constitutional terms does not obscure the fact that in each instance, the trial court's evidentiary rulings were correct and that the decision is additionally sustainable upon independent grounds.

The decision below was clearly correct. Medical science and the unique skills of the surgeons offered a victim of end-stage heart disease two chances at survival, conventional surgical repair and cardiac transplantation. While ultimately unsuccessful, the three staged procedure represents an historic medical effort. The evidence of nine physicians called by petitioners raised no issue of breach of duty or causation. The directed verdict of the trial court was properly affirmed, a fair and just result.

CONCLUSIONS

For the reasons above stated, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,



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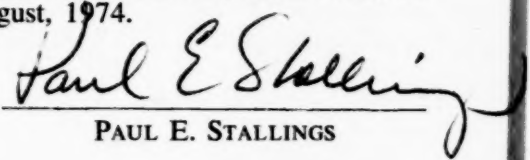
CERTIFICATE OF SERVICE

True and correct copies of the foregoing brief have been served upon Mr. John H. Holloway, 926 North Wilcrest Drive, Houston, Texas 77024 and Mr. A. J. Watkins, 443 The Main Building, Houston, Texas 77002 on this 16th day of August, 1974.



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